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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1017.

THE INTERLAKE STEAMSHIP COMPANY,

Petitioner,

v.

MARCELLA R. NIELSEN, and STEPHEN O'HEARNE, as Successor to JOHN J. NEWMAN, Deputy Commissioner, Administering the Longshoremen's and Harbor Workers' Compensation Act,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

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No. _____.

THE INTERLAKE STEAMSHIP COMPANY,

Petitioner,

v.

MARCELLA R. NIELSEN, and STEPHEN O'HEARNE, as Successor to JOHN J. NEWMAN, Deputy Commissioner, Administering the Longshoremen's and Harbor Workers' Compensation Act,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner, The Interlake Steamship Company, prays that the Court issue its writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgments in causes No. 15,705 and No. 15,706 on the docket of that court.

OPINIONS BELOW.

The opinions below that generate the question that now comes to the Court under the Longshoremen's and Harbor Workers' Compensation Act may be found as follows:

Opinion of the Deputy Commissioner, making an award under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901, et

seq., is unreported but appears in the Appendix hereto, printed under separate cover, at page 2.

Opinion of United States District Judge Jones of the Northern District of Ohio, upon review of the award pursuant to 33 U. S. C. 921(b), setting the award aside on the ground the accident was not one "occurring upon the navigable waters of the United States" within the meaning of the statute, 33 U. S. C. 903(a), is likewise unreported but appears in the Appendix at page 8.

Supplemental opinion of District Judge Jones, unreported, is in the Appendix at page 16.

Opinion of the United States Court of Appeals for the Sixth Circuit, written by Judge Edwards (with the concurrence of Judge Weick, Chief Judge of the Sixth Circuit, and Judge Prettyman, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation) reinstating the award, is reported in 338 F. 2d 879, and appears in the Appendix at page 17.

JURISDICTION.

The judgments in question are dated and were entered December 3, 1964 (Appendix, p. 24); timely petition for rehearing was denied January 12, 1965. (Appendix, p. 25.)

This Court has jurisdiction to review under 28 U. S. C. 1254(1), within the 90 days fixed by 28 U. S. C. 2101(c).

QUESTION PRESENTED.

This case, arising under the Longshoremen's and Harbor Workers' Compensation Act, presents the question:

> Whether the provision of the Longshoremen's and Harbor Workers' Compensation Act, authorizing the grant of compensation "only if the disability or death results from an injury occurring upon the navigable waters of the United States," 33 U. S. C. 903(a), is satisfied where a shipkeeper met death when he "drove his car off the end of the dock" into the navigable waters of Lake Erie.

If driving "his car off the end of the dock" is an act "occurring upon the navigable waters," within the meaning of the statute, the award of compensation is correct; if not, recovery may be had only under the Ohio Workmen's Compensation Act. Ohio Revised Code § 4123.01. The Ohio statute clearly would cover the death here in question. *Klump v. Industrial Commission of Ohio* (1940), 65 Ohio App. 270, 29 N. E. 2d 627 (Judges Ross, Hamilton and Matthews).

The award made, and set aside by the District Court, was at the rate of $52.65 per week from January 12, 1959 (amounting to $10,845.90, plus $400 for funeral expenses), and $52.65 per week commencing December 24, 1962. (Appendix, pp. 6-7.)

Under the Ohio Act, since the decedent's weekly wage was "in excess of $81.00 per week" (Appendix, p. 5) the benefits would be $49 per week (from January 12, 1959) continuing until $15,000 shall have been paid, plus, in this case, an additional $1,000 for each of the three dependents, amounting to a total of $18,000. Ohio Revised Code § 4123.59(B).

STATUTE INVOLVED.

This case turns on § 3 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 903, Act of March 4, 1927, c. 509, § 3, 44 Stat. 1426. The statute, with the portion here pertinent italicized, reads:

"**§ 903. COVERAGE.**

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but *only if the disability or death results from an injury occurring upon the navigable waters of the United States* (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

STATEMENT OF CASE.

The action arises under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901, *et seq.*, and concerns only the question whether the accident occurred "upon the navigable waters of the United States." 33 U. S. C. 903(a).

The record presents two cases, and two judgments, because a beneficiary and the Deputy Commissioner administering the Longshoremen's Act separately appealed the District Court's judgment setting aside the award. The two appeals were consolidated for hearing by the Court of Appeals and jointly present the single question brought here.

—The Facts on Which Case Turns.

The Deputy Commissioner found, both courts below agreed, and it is undisputed here, that Carl O. Nielsen, the decedent, as the Court of Appeals summarized it (Appendix, p. 18):

"drove his car off the end of the dock * * *."

Why he did this the record does not show.

The decedent was employed as the shipkeeper on the Great Lakes freighter ARCTURUS, moored for the winter in Maumee Bay at Toledo, Ohio. He was last seen alive at his home on a Saturday night in January 1959. The Deputy Commissioner found that "on the aforesaid Saturday night of January 10, 1959, between 9:00 and 10:00, the deceased, after having had his supper at home, left home by his automobile * * *." (Appendix, p. 4.) His body was recovered two days later in deep water "at the outer end of the dock" (Appendix, p. 4) at a point "approximately 25 feet" from its edge. (Appendix, p. 5.)

When the body was recovered from the waters of the bay:

> "the deceased was seated in the driver's seat of his automobile with his hands on the wheel and his foot on the brake * * *." (Appendix, p. 4.)

The watch the decedent carried had stopped at 3:15. (Appendix, p. 5.) The Deputy Commissioner concluded, therefore, that the accident and death occurred at 3:15 A. M. Sunday, January 11, 1959 (Appendix, p. 5) and that:

> "the aforesaid Carl O. Nielsen suffered injury when, striking the aforesaid mooring lines enroute, he drove his car over and off the outer end of the dock and into the ice and water of the aforesaid Maumee Bay; that as a result of said injury the aforesaid Carl O. Nielsen sustained skull fractures and brain damage which caused his death * * *." (Appendix, p. 5.)

The decedent, shortly before his death (Appendix, p. 5) "had imbibed some six to eight ounces of whiskey," but, the Deputy Commissioner added:

> "the fatal injury was not occasioned solely by the intoxication of the employee * * *." (Appendix, p. 5.)

—Longshoremen's Act Alone Controls.

The only federal act applicable is the Longshoremen's and Harbor Workers' Compensation Act. 33 U. S. C. 901, *et seq.* The statute's exclusion of liability, 33 U. S. C. 903(a)(1), to a "member of a crew" does not here apply because the vessel was withdrawn from navigation (and had been for more than a year). Decedent, who served as custodian, or "shipkeeper," therefore could not be regarded as "crew." *Hawn v. American S. S. Co.* (2 C. A., 1939), 107 F. 2d 999; *O'Leary v. Coastal Nav. Co.* (9 C. A., 1951), 193 F. 2d 717. And, because the decedent was not a "sea-

man," the Jones Act, 46 U. S. C. 688, 41 Stat. 1007, does not apply.

Of the Longshoremen's Act, the only portion here applicable—the meaning of which is in question—is the statute's provision that compensation thereunder shall be payable:

> "only if the disability or death results from an injury occurring upon the navigable waters of the United States * * *." 33 U. S. C. 903(a).

—Basis of Division in Courts Below.

Concerning the legal effect of the facts found—as above set forth—the courts below divided.

The District Court held the accident did not occur "upon the navigable waters of the United States" as specified by the statute. 33 U. S. C. 903(a). The District Court considered:

> "The place of culmination of an injury, whether it be by drowning or by striking the dock, is not determinative of whether admiralty has jurisdiction" (Appendix, p. 14),

and held:

> "the test must be that *if the impetus which put in motion the sequence of events* resulting in the fatal accident came from the land, and operated on the person injured while on land, then there can be no jurisdiction and no valid award." (Appendix, p. 14.)[1]

The Court of Appeals, on the other hand, held the accident *did* occur "upon the navigable waters" *because nothing happened to the decedent until he hit the icy waters of Maumee Bay*—which admittedly are "navigable waters." (Appendix, p. 18.) It was the consummation on

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[1] Emphasis supplied throughout.

the water of events originating on the dock that, the Court of Appeals thought, controlled. The Court of Appeals reasoned:

> "No one asserts that claimant was killed (or injured) *until the impact* on the frozen substance of the navigable waters at the end of the dock." (Appendix, p. 23.)

This is the reasoning that satisfied the man who fell from the 50th floor of a skyscraper, as he passed the 6th, that he was quite all right, for nothing had happened.

It is this reasoning that led the Court of Appeals to the conclusion that "the situs of his injury and death was clearly within the scope of admiralty jurisdiction." (Appendix, p. 23.)

As will be seen, this Court has five times repudiated this as a test of admiralty jurisdiction, and has three times rejected the rule the Court of Appeals has now made law in the Sixth Circuit.

REASONS FOR GRANT OF WRIT.

This case presents the kind of problem this Court should review, because:

I. RULING BELOW BRINGS UNCERTAINTY TO THE ONE AREA OF ADMIRALTY LAW THAT, SINCE ENACTMENT OF LONGSHOREMEN'S ACT NEARLY FOUR DECADES AGO, HAS HAD CLEAR AND CERTAIN MEANING.

Until now the meaning of the provision that the Longshoremen's and Harbor Workers' Compensation Act applies, 33 U. S. C. 903(a):

> "only if the disability or death results from an injury occurring upon the navigable waters of the United States"

has been clear. Judge Chesnut, in *Ford v. Parker* (D. C. Md., 1943), 52 F. Supp. 98, 101, called the governing rule "simple and easily applied"—itself a very great merit.

But, under the decision below, this is no longer so.

1. Controversy Has Raged Over Other Provisions of Statute—But Not This.

Controversy, with roots in *Southern Pacific Company v. Jensen* (1917), 244 U. S. 205, as this Court knows better than most, has plagued the Longshoremen's Act. The storm has centered on the meaning of the provision that the Longshoremen's Act shall apply only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." This issue is no more—for

—(a) Calbeck Settled "State Law" Issue; It Brought Certainty to that Part of Act.

By *Calbeck v. Travelers Insurance Co.* (1962), 370 U. S. 114, this Court settled the controversy concerning—and, by amputation, brought certainty to—the statute's reference to "State law." It now is clear that the Longshoremen's Act does not cease to apply when state compensation is available. The irony, however, is that—

—(b) Calbeck Now Has Been Used to Blow "Navigable Waters" Into Uncertainty.

Nothing in *Calbeck*, 370 U. S. 114, gives the slightest hint that the Court intended to modify the statute's provision that it applies "only if the disability or death results from an injury occurring upon the navigable waters." The court below could not point to such hint either, nor could it point to a decision by this Court, or any other, saying that it is an accident "occurring upon the navigable waters" when one drives his automobile off the dock. The court below found that hint (Appendix, p. 23) only by a "clairvoyance" that depends upon a gigantic *non sequitur*. The Court of Appeals said:

> "If *Calbeck* holds (and we think it does) 'that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority,' then there can be no doubt about the outcome of this appeal." (Appendix, p. 23.)[2]

It does not follow from *Calbeck*, as the Court of Appeals mistakenly supposed (Appendix, p. 23), "that the

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[2] The language concerning *Calbeck* is Judge Hutcheson's characterization, in *De Bardeleben Coal Corporation v. Henderson* (5 C. A., 1944), 142 F. 2d 481, 483, of this Court's decision of a quarter century ago in *Parker v. Motor Boat Sales, Inc.* (1941), 314 U. S. 244, quoted in *Calbeck*, 370 U. S. at 130, and refers, *not* to the "navigable waters" limitation of the statute here in question, but to its "State law" provision.

situs of his injury and death was clearly within the scope of admiralty jurisdiction," nor does it follow that Congress intended—if it could—to change admiralty jurisdiction. To the contrary, everything the Court said in *Calbeck* accepts the limitation that the statute applies "*only if* the disability or death results from an injury occurring upon the navigable waters." The Court gave no hint of dissatisfaction with the "simple and easily applied" admiralty rule the courts had for years applied to this provision of the Longshoremen's Act. The courts have uniformly held—

2. "Navigable Waters" Provision Links Act To Rule Defining Admiralty Jurisdiction.

The rule the courts—until now—have applied to the provision making the Longshoremen's Act apply "only if the disability or death results from an injury occurring upon the navigable waters" is the rule fashioned by the courts to define the reach of admiralty jurisdiction.

—(a) Admiralty Rule Is Well-Defined; It Is Solidly Bedded in This Court's Cases.

Two cases from this Court will illustrate the admiralty rule as applied to the problem here before the Court, viz.:

T. Smith & Son, Inc. v. Taylor (1928), 276 U. S. 179, where a longshoreman, engaged in unloading a vessel, *was thrown from the wharf into the water* and drowned. This was *not* within the jurisdiction of admiralty, even though the workman landed in the water and there drowned. Why? Because, said Mr. Justice Butler for a unanimous Court, the blow that brought death (p. 182) "was given and took effect while the deceased was upon the land." The Court (p. 181) applied the

rule: "If the cause of action arose upon the river, the rights of the parties are controlled by maritime law * * *. But, if the cause of action arose upon the land, the state law is applicable."

Minnie v. Port Huron Terminal Co. (1935), 295 U. S. 647, where a longshoreman, engaged in unloading a vessel, *was thrown from the ship's deck to the wharf* and was there injured. This *was* within the jurisdiction of admiralty. Why? Because, said Mr. Chief Justice Hughes for a unanimous Court (p. 648) it was the "blow received on the vessel in navigable water which gave rise to the cause of action, and the maritime character of that cause of action is *not altered* by the fact that the petitioner was thrown from the vessel to the land."

The Court applied this rule to a debarking passenger who fell from the ship's gangplank to the wharf, in *The Admiral Peoples* (1935), 295 U. S. 649. The Court, again unanimous, in an opinion by Mr. Chief Justice Hughes held the case within the jurisdiction of admiralty because the passenger (p. 652) "had not yet left the vessel" and the fact that "she fell on the dock" could not alter the case.

The Court recognized the rule also in *Swanson v. Marra Brothers, Inc.* (1946), 328 U. S. 1, in dealing with a claim, there asserted under the Jones Act, 46 U. S. C. 688, for injury to (p. 2) "a longshoreman * * * *while on a pier* and engaged in loading cargo * * *." The Court, again unanimous except that Mr. Justice Jackson did not participate, pointed out (in an opinion by Mr. Chief Justice Stone, read by Mr. Justice Black) that Congress (p. 5) "has expressed its purpose to *restrict* the liability of the employer under federal statutes to injuries to his em-

ployees *occurring on navigable waters* * * *." Referring to the provision of the Longshoremen's Act now in question, the Court said (p. 7):

> "since this Act is restricted to compensation for injuries occurring on navigable waters, *it excludes* * * * *injuries inflicted on shore.* The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law * * *."

This is the rule that, up to now, has governed the Longshoremen's Act.

—(b) Admiralty Rule Has Uniformly Measured "Navigable Waters" Provision of Statute.

In the nearly four decades that the courts have dealt with the Longshoremen's Act, the uniform course of decision has been that the statute's "navigable waters" provision is to be construed in accordance with the admiralty rule. As the District Court here put it:

> "For the purpose of determining whether an injury occurred upon navigable waters, thus within admiralty jurisdiction and within the scope of the Harbor Workers' Act, the test to be applied is the test of admiralty jurisdiction in tort cases." (Appendix, p. 13.)

To this rule the courts, dealing with the "navigable waters" provision of the Longshoremen's Act, have adhered throughout the life of the Act, as is illustrated by:

L'Hote v. Crowell (5 C. A., 1931), 54 F. 2d 212, 213, reversed on other grounds (1935), 286 U. S. 528, and expressly approved in *The Admiral Peoples* (1935), 295 U. S. 649, 653-654;

Lowe v. Central R. Co. of New Jersey (3 C. A., 1940), 113 F. 2d 413, 415;

American Export Lines, Inc. v. Revel (4 C. A., 1959), 266 F. 2d 82, 84;

Thibodeaux v. J. Ray McDermott & Co., Inc. (5 C. A., 1960), 276 F. 2d 42, 49.

Only in the Sixth Circuit is the rule different.

3. Reasons Assigned by Court of Appeals for Abandoning Admiralty Rule Are Untenable.

The Court below found no case to command its decision. Instead the court said:

> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of *expanding the boundaries of admiralty* jurisdiction toward land." (Appendix, p. 23.)

The court erred:

—(a) Decision's "Expanding Boundaries of Admiralty" Rests on Misapprehension.

The three reasons assigned by the Court of Appeals for its decision reveal misapprehension:

1. *Case law.* There is no such trend. The Court of Appeals thought there was because it mistook (Appendix, p. 21) the comments of Gilmore and Black, *The Law of Admiralty* (1957) Chapter 6, Section 6-5, Note 12, page 253, concerning "The radical reconstruction of maritime personal injury law since 1940" to refer to the "navigable waters" provision of the Longshoremen's Act which alone is here in question. The reference the court misunderstood is to the great change wrought in the warranty of seaworthiness and *not* to the "navigable waters" limitation of the Longshoremen's Act. The Gilmore and Black discussion of the Longshoremen's Act begins *80 pages later*

(Section 6-45 to Section 6-53, pages 333-358). Concerning the question "Whether or not the injury occurred *on navigable waters*" Gilmore and Black say (p. 339):

> "that determination could be made in most cases without too much toil and sweat (bearing in mind that while the dock is an extension of the land and not navigable waters, the gangway is an extension of the ship and is navigable waters)."

2. *Admiralty Extension Act.* It is difficult to know what the Court of Appeals could have had in mind. The Admiralty Extension Act, 46 U. S. C. 740, Act of June 19, 1948, c. 526, 62 Stat. 496, says:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water,* notwithstanding that such damage or injury be done or consummated on land."

This statute can have no conceivable "impact" in bringing this case under the Longshoremen's Act.[3]

3. *Calbeck.* Nothing in *Calbeck,* 370 U. S. 114, as has been pointed out, touches this case or remotely suggests that this case is (Appendix, p. 23) "within the scope of admiralty jurisdiction" because, as the Court of Appeals thought (Appendix, p. 23), the injury occurred only when the decedent's automobile hit the "navigable waters at the end of the dock."

To the contrary—

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[3] Even if there were a connection between the vessel and the injury, it still would seem to be obvious, as Judge Hoffman held in *Revel v. American Export Lines, Inc.* (E. D. Va., 1958) 162 F. Supp. 279, affirmed in *American Export Lines, Inc., v. Revel* (4 C. A., 1959), 266 F. 2d 82, 84, the Admiralty extension Act cannot be read (162 F. Supp. at 284) "to amend the federal compensation act [*i.e.,* the Longshoremen's and Harbor Workers' Compensation Act] *to include injuries occurring on land* as well as 'upon the navigable waters' * * *."

—(b) This Court Has Three Times Rejected Rule Court of Appeals Here Embraced.

The rule now made law in the Sixth Circuit has three times been urged upon—and rejected by—this Court:

The *first* was in *T. Smith & Son, Inc. v. Taylor* (1928), 276 U. S. 179. The Court was importuned—but the Court rejected the invitation—to adopt the very rule the Court of Appeals in this case has now added to the law. The Court was urged to hold that:

> "regardless of the point of origin of an accident, Admiralty takes jurisdiction where the cause of action *is completed on navigable waters* * * *." [4]

As has been seen, this Court held directly to the contrary.

The *second* time this Court was urged to adopt the rule embraced by the Court of Appeals was in *Vancouver Steamship Co., Ltd. v. Rice* (1933), 288 U. S. 445. A stevedore, hit aboard the vessel by a falling sling of lumber, was taken ashore where he died one hour later. The administratrix (p. 446) "electing under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 933) to assert her claim against a third party, filed a libel in admiralty * * *." This brought objection that admiralty had no jurisdiction because the cause of action depended on the Oregon Wrongful Death Act and therefore did not, and could not, arise (p. 445) "until death actually occurs." Since death came on shore, it was urged (p. 447) "that the cause of action arose on land" and (p. 445) "the admiralty court was without jurisdiction." This Court rejected the argument because (p. 447):

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[4] Brief of plaintiff in error, filed November 7, 1927, No. 186 October Term 1927, p. 12; the same argument in varying forms appears also on pages 2, 4, 5, 9, 26, 36, 38.

"The right to recover for death depends upon the law of the place of the act or omission that caused it *and not upon that of the place where death occurred.*"

The *third* time the rule now adopted in the Sixth Circuit was rejected in this Court was in *Minnie v. Port Huron Terminal Co.* (1935), 295 U. S. 647. A longshoreman was hurled from the deck of a vessel to the wharf. It was argued:

"petitioner had no cause of action *until he struck the wharf.* If a fireman's net had been stretched over the wharf petitioner would have fallen harmlessly into it and would have possessed no cause of action, maritime or otherwise. Likewise if petitioner had been able to land on his feet or hands, or both, he probably, or at least possibly, would not have been actionably injured." [5]

This Court rejected the argument.

Now—after being three times rejected by this Court—the rule that the *place of consummation of the injury* governs, is made law in the Sixth Circuit.

II. RULING BELOW RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

This Court. in sustaining the constitutional validity of the Longshoremen's Act, in *Crowell v. Benson* (1932), 285 U. S. 22, deemed the "fundamental requirements" to be (p. 55):

"that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also

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[5] Petitioner's brief, filed February 2, 1935, No. 678, October Term 1934, p. 17.

because the power of the Congress to enact the legislation turns upon the existence of these conditions."

The reason is (p. 55):

"the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction."

Now, what this Court said the Congress could not write into the statute, the Sixth Circuit has put there.

CONCLUSION.

The decision below is freighted with melancholy consequences for many a longshoreman's claim; it creates uncertainty in the meaning of an immensely important public Act; it establishes one law for Great Lakes and river shipping centered in the Sixth Circuit and leaves another law in effect on the Atlantic, Gulf and Pacific coasts; it raises a seiche that will be felt through all of admiralty jurisdiction beyond the confines of the single Act here before the Court.

The writ should issue.

Respectfully submitted,

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